

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of C.W.,)
)
And)
)
Carmel Clay Schools and Hamilton-) **Article 7 Hearing No. 1315.02**
Boone-Madison Special Services Unit)
)
Appeal from a Decision by)
Rolf W. Daniel, Ph.D.)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

On October 17, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed that same day. The IHO held a pre-hearing conference and issued his pre-hearing order on October 29, 2002, advising the parties of their hearing rights and identifying the issue for hearing as:

Is a shortened school day appropriate for the student?

The hearing was scheduled for November 21, 2002. On November 2, 2002, a written request was received from the Student asking that the school be compelled to forward documentation concerning the education, training and experience of school personnel who have contact with the Student. The School agreed to respond to the request by treating the questions as interrogatories, and the IHO supported the School's manner of responding to the Student's request.

On November 11, 2002, the Student requested an extension of time for the hearing. A forty-five day extension was granted, such that the decision would be rendered on or before January 13, 2003. The School filed a Motion to Dismiss on November 11, 2002. The IHO requested the Student respond on or before November 21, 2002. On November 20, 2002, the Student retained legal counsel who immediately requested an extension of time in which to respond to the School's Motion to Dismiss. An extension was granted such that the Student's response was due by

December 13, 2002. The Student's response was filed on December 13, 2002. On December 19, 2002, the IHO denied the School's Motion to Dismiss.

The hearing took place on January 7, 2003 after an informal pre-hearing conference. The School's Exhibits 1 through 5 were admitted without objection. The Student offered Exhibits 1 through 35. The School objected to all evidence that pertained to the Student's private school and placement. The IHO noted the objection but admitted the evidence. During the course of the hearing a witness was asked to respond to questions concerning Petitioner's Exhibit 35. The School objected on the basis of attorney/client privilege and asked to strike the exhibit from the record. The IHO determined the exhibit related to privileged communication and the exhibit was removed from the record.

The parties were advised of their rights prior to the hearing. The parent was informed of the right to have the Student present; however, the Student was not present. The parties agreed to a separation of witnesses. The hearing was **open** to the public at the request of the parent.

The Written Decision of the IHO

The IHO's written decision was issued on January 13, 2003. The following information is a summary of the 9 Findings of Fact determined by the IHO.

The Student is a six year, 11 month old male who has been appropriately identified as manifesting an Autistic Spectrum Disorder and is eligible for and receiving special education services as a first grader. On November 5, 2001, when the Student was attending kindergarten, his individualized education plan (IEP) was amended to increase time at school to five full days per week from a shorter amount of time. The parent had written that "Because of his special needs, (the Student) requires as much school as he can get."

An annual case review was held on April 16, 2002, at which time the Case Conference Committee (CCC) developed an IEP for the 2002-2003 academic school year. The parent signed the IEP indicating agreement with the recommendations and placement.

In August 2002, the parent requested a CCC meeting that was held on August 29, 2002. The parent requested a shortened school day and a specific methodology that included ABA/Discrete trial training (one-on-one), errorless teaching, and ABLLS Curriculum. The School refused the request for a shortened school day and offered to discuss options to the parent's proposal. No further discussions took place concerning the Student's educational program, as the parent wanted to talk only of the options presented in her written proposal. The CCC meeting lasted no more than 10 minutes.

The parent placed the Student in a part-time private program in September, 2002. The Student attends the private school in the afternoons, four days per week while continuing to attend the public school in the mornings and all day on Friday. The parent pays all costs involved with the private school. The Student receives ABA (Applied Behavior Analysis) based upon the ABLLS (Assessment of Basic Language and Learning Skills) curriculum at the private school.

The Student's teacher in the public school uses ABA in her classroom and is familiar with

ABLLS. The School can provide ABA and ABLLS in the public school if a case conference were to find such methods appropriate for the Student. There was no dispute as to the appropriateness of the Student's April 16, 2002, IEP.

From these Findings of Fact, the IHO reached 3 Conclusions of Law, which are summarized as follows.

There was no dispute as to the appropriateness of the April 16, 2002, IEP which was developed under the assumption the Student needed to attend a full day of school. The parent has requested a shortened school day in order to allow the Student to participate in programs at a private school. The parent's proposal does not shorten the Student's school day, but changes the day with respect to where the Student receives programming and the methodology involved. Therefore, the IHO concluded that a shortened school day would be inappropriate for the Student.

Although the issue framed for hearing was whether a shortened school day was appropriate for the Student, arguments during the hearing raised the question of whether it would be appropriate for the Student to attend a half day at the public school and a half day at the private school. 511 IAC 7-27-10(a) allows a CCC to provide special education instruction in alternative settings for reasons other than injuries and illnesses. In making that determination, the CCC report shall include the reason the Student is not attending school, other options tried or considered, and the reasons the other options were rejected. Instruction in an alternate setting is appropriate only if other options have been tried or considered and there is justification for those options being rejected. The IHO concluded the School's refusal to accept the parent's request for a shortened school day such that the Student could benefit from a private school was appropriate as was the School's attempt to first discuss other options that could be tried before entertaining discussion concerning a shortened school day to allow the Student to attend a private school.

511 IAC 7-18-2(a) identifies the School's responsibility to provide a free appropriate public education (FAPE). An appropriate education as directed by a student's IEP is to be free of charge to the parent. If education in a private school is found by a CCC to be the appropriate least restrictive environment for the student's educational placement, then it is the obligation of the school to provide that placement at no cost to the parent. It is also the obligation of the school to ensure that the placement is the least restrictive alternative and that the placement is made in the manner stated in 511 IAC 7-27-10(a). The IHO concluded that the school has offered a FAPE as set forth in Article 7.

Based on the foregoing, the IHO ordered the School to provide the educational program delineated in the April 16, 2002, IEP.

Appeal to the Board of Special Education Appeals

On February 14, 2003, the Student, by counsel, timely filed his Petition for Appeal. On February 20, 2003, the School, by counsel, requested an extension of time in which to file its response to the Student's petition. By order dated February 21, 2003, the School was granted an extension until March 10, 2003, in which to file its reply. The timeline for the Board of Special Education Appeals (BSEA) decision was extended until April 10, 2003. The School timely filed its Response to the Petition for Review on March 10, 2003.

Petition for Review

The Student takes exception to the IHO's findings that the School offered to discuss options to the parent's proposal and that the parent wanted to talk only of the option presented in her request. The Student states this leaves the inference that the School was willing to discuss the parent's proposal. The Student takes exception to the IHO's finding that the parent never requested the School provide the methodology and curriculum the private school provides. The parent was unaware of this method of instruction at the April 16, 2002, case conference and therefore couldn't have made such a request of the School. The Student also takes exception to the IHO's finding that the April 16, 2002, IEP was appropriate. The parent didn't contest the appropriateness of the IEP when it was written as she was unaware of the methodology and curriculum offered by the private school. Further, the appropriateness of the April 16, 2002, IEP was not an issue for this hearing. The Student takes exception to all three conclusions made by the IHO, arguing that the IHO has failed to consider whether it would be appropriate for the Student to have a shortened public school day while attending a private program for the remainder of what would be a full instructional day. Further, the Student argues the conclusion that the School has offered a FAPE is beyond the scope of this hearing and there was insufficient evidence to support this conclusion.

Response to Petition for Review

The School responded to the Student's petition by noting that the Student doesn't really dispute the findings of fact. Rather, the Student attempts to offer explanations. However, the facts as found are supported by substantial evidence. Similarly, the IHO's conclusions of law are supported by the findings and appropriately address the issue of whether a shortened school day is appropriate for the Student. The School notes that the issue is not, as the Student attempts to recast it, whether a shortened school day in the public school is appropriate for the Student.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated February 27, 2003. Review was set for March 12, 2003, in Indianapolis, in the offices of the Indiana Department of Education. All three members of the BSEA appeared on March 12, 2003. After review of the record as a whole and in consideration of the Petition for Review and the Response thereto, the BSEA makes the following determinations.

Combined Findings of Fact and Conclusions of Law

1. The Student timely appeals from the decision of the IHO. The School timely responds. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the

BSEA finds the IHO's decision to be:

- a. arbitrary or capricious.
- b. an abuse of discretion.
- c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
- d. in excess of the jurisdiction of the IHO.
- e. reached in violation of an established procedure.
- f. unsupported by substantial evidence.

511 IAC 7-30-4(j).

3. The Student has been identified as manifesting an Autistic Spectrum Disorder and is eligible for special education services as a first grader.
4. On November 5, 2001, the Student's IEP was amended to increase his instructional time to five full days per week while in kindergarten.
5. On April 16, 2002, an IEP was developed for the Student providing for a full-time instructional day. The parent signed the IEP indicating her agreement with the IEP. No testimony or evidence was presented to indicate this IEP is no longer appropriate to meet the Student's needs.
6. In August, 2002, the parent requested a CCC meeting to determine whether a shortened school day was appropriate. The rationale provided by the parent was parental preference for a specific methodology. At the CCC meeting, the School indicated it felt the April 16, 2002, IEP was appropriate, but was willing to discuss alternatives to the parent's request for a shortened school day. The parent refused to discuss alternatives.
7. The IEP of April 16, 2002, is appropriate to meet the Student's educational needs.
8. The sole issue for hearing was whether a shortened school day was appropriate for the Student. No testimony or evidence was presented which indicated the Student required a shortened school day.

ORDER

In consideration of the foregoing, the Board of Special Education Appeals now upholds the decision of the IHO in its entirety.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: March 12, 2003

/s/ Raymond W. Quist, Ph.D.

Raymond W. Quist, Ph.D., Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C 4-21.5-5-5 and 511 IAC 7-30-4(m).